FILED
AUG 28 1978

No. 77-1787

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANTHONY J. GIACALONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court issued no written opinion. The opinion of the court of appeals (Pet. App. 20-40) is reported at 574 F. 2d 328.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1978, and a petition for rehearing was denied on May 19, 1978 (Pet. App. 41). The petition for a writ of certiorari was filed on June 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government met its burden of establishing petitioner's opening net worth with reasonable certainty in a criminal tax evasion case prosecuted under the net worth method of proof.

2. Whether the government may, in a criminal tax evasion prosecution against a husband for underreporting income on the joint tax returns of himself and his wife, use the joint net worth of the couple in making its computations under the net worth method of proof.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on three counts of willfully attempting to evade and defeat his income tax for the years 1968, 1969, and 1970, in violation of 26 U.S.C. 7201.[1] The district court sentenced petitioner to consecutive terms of two years' imprisonment on the first count and four years' imprisonment on each of the second and third counts. The court of appeals affirmed (Pet. App. 20-40).

The evidence showed that petitioner and his wife filed joint income tax returns for the years in question (Pet. App. 20). Petitioner reported various sources of investment income on these returns and included substantial figures for "speculation income" (A. 550-553).[2] Petitioner listed his occupation as "investor" on these returns (A. 554).

The government employed the net worth plus nondeductible expenditures method of proof and presented numerous witnesses who testified as to assets purchased by petitioner and his wife, and nondeductible expenditures made by them, during 1968-1971 (*e.g.*, A. 693, 741-745, 752-756, 809-812, 815-822, 841-844, 1033-

[1]Petitioner was acquitted on a fourth count, for the year 1971.

[2]"A." refers to the Joint Appendix filed in the court of appeals, which includes excerpts from the trial transcript and exhibits.

1035, 1036-1037, 1039-1040). The government's witnesses also testified that petitioner fully controlled the couple's finances and tax reporting (*e.g.*, A. 505-509, 538, 647-656, 662-689, 1025-1027, 1032). The evidence adduced at trial showed that petitioner had understated his taxable income by $30,949 for 1968, $97,504 for 1969, and $89,370 for 1970 (A. 2043).

The Internal Revenue Service conducted an exhaustive investigation of petitioner and his wife. For example, the Service checked the probate records of petitioner's parents and in-laws (A. 976-979). It also examined the Social Security Administration records of petitioner's wife from 1937 through December of 1971. These records revealed that petitioner's wife had no income during that period (A. 872-873). In addition, the government introduced a cash analysis for 1951-1967 that showed that petitioner could not have accumulated any hidden cash reserve from known sources of income prior to the prosecution years (Pet. App. 24-25; A. 2080-2093).

Petitioner's defense consisted primarily of the testimony of members of his family and a defense summary witness. Petitioner's sister testified that petitioner possessed a $300,000 cash hoard at the beginning of the prosecution period (A. 1258-1275, 1303-1344). Other relatives of petitioner testified that petitioner incurred some expenditures on behalf of members of his family (A. 1180-1200, 1285-1286).

ARGUMENT

1. The net worth plus nondeductible expenditures method of proving income tax evasion is a well-established and judicially accepted prosecutorial technique in cases where the taxpayer's records are inadequate as a basis for determining income tax liability. One basic assumption in establishing the existence of tax evasion is

that most of a person's assets derive from taxable sources. Thus, under the net worth method of proof, the government seeks to establish an "opening net worth" figure representing the total net value of the taxpayer's assets at the beginning of a given year. Thereafter, the government proves increases in the tax-payer's net worth for each succeeding year of the period under scrutiny and computes the difference between the net values of the taxpayer's assets as of the beginning and end of each year. Nondeductible expenditures, such as living expenses, are added to the annual increases. If the resulting figure for any year substantially exceeds the taxpayer's reported taxable income for that year, the excess represents unreported taxable income. See *Holland* v. *United States*, 348 U.S. 121, 125-126.

Petitioner contends (Pet. 7-15) that the government failed to established his opening net worth with reasonable certainty, as required by *Holland* v. *United States, supra,* because the net worth computation used a hyphen for cash on hand during each of the prosecution years rather than an exact figure (see Pet. App. 23). But the use of hyphens for cash on hand in this case was entirely appropriate. The case was tried on the theory that the substantial increases in petitioner's net worth represented the receipt of unreported taxable income. Petitioner's defense was that he had acquired a cash hoard prior to the prosecution years and the apparent increases in his net worth reflected his expenditure of cash from this hoard. The evidence established that petitioner's cash position remained relatively uniform during the prosecution years (see, *e.g.*, A. 1060-1064). Thus, the hyphen was properly used to represent that petitioner had a constant but not precisely determinable amount of cash on hand at all times—an amount that could have varied slightly from time to time, but not enough to affect significantly the large increases in petitioner's net worth (A. 1060-1064). In these circumstances, it is settled that

exact precision as to cash on hand is not required in a net worth case.[3] Petitioner was free to attempt to establish that he had a substantial amount of cash on hand at the starting point, and it was for the jury to resolve that factual question. *United States* v. *Mackey*, 345 F. 2d 499, 506 (C.A. 7), certiorari denied, 382 U.S. 824; *Fowler* v. *United States*, 352 F. 2d 100, 107 (C.A. 8), certiorari denied, 383 U.S. 907.

Moreover, the record demonstrates that the government met its burden of establishing petitioner's opening net worth with reasonable certainty. During the eight-month trial, the government called 250 witnesses and introduced 3,583 exhibits. The government's summary witness, using evidence previously admitted,[4]

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[3]See, *e.g.*, *United States* v. *Carter*, 462 F. 2d 1252 (C.A. 6), certiorari denied, 409 U.S. 984 (cash on hand treated as $1,000 constant); *United States* v. *Bush*, 512 F. 2d 771 (C.A. 5) (cash on hand treated as a zero constant); *United States* v. *Mackey*, 345 F. 2d 499, 505 (C.A. 7), certiorari denied, 382 U.S. 824 (no figure for cash on hand, since any amount would have been purely arbitrary).

Petitioner erroneously asserts (Pet. 8-9) that the court of appeals "assumed" the cash on hand remained constant, and that the hyphen used to represent cash on hand was an unknown that he equates to zero (Pet. 13-15). The court of appeals recognized (Pet. App. 24-25) that the hyphen represented a constant that did not change during the prosecution years and therefore had no effect on the net worth computations. In so holding, the court accepted the testimony of the government's expert summary witness (A. 1060-1064) that "[a] dash means that the cash position had been determined to be uniform." Contrary to petitioner's further argument (Pet. 13), the summary witness did in fact give credit to petitioner for cash on hand in each year. The witness testified that the hyphen meant that the amount of cash was relatively uniform during the prosecution years (A. 1063).

[4]Contrary to petitioner's further argument (Pet. 9 n. 1), the decision below allowing the government's summary witness to explain the use of the hyphens in his computations did not conflict with *Corbett* v. *United States*, 238 F. 2d 557 (C.A. 9), certiorari denied, 352 U.S. 990. That case, as well as the other precedents cited by petitioner, follow the general rule that an expert summary witness may summarize only evidence in the record. *United States* v.

prepared the net worth schedules (Ex. 3517, A. 2042-2079), a computation of additional tax due (Ex. 3519, A. 2094), and a cash analysis for purposes of determining whether petitioner could have had a substantial amount of cash on hand at the net worth starting point (Ex. 3518, A. 2080-2093). The cash analysis showed that petitioner could not have accumulated a cash reserve from prior known sources of income because his tax returns showed that he had spent at least $81,000 more than was available to him during the period 1951-1967.

Finally, the question of cash on hand was fully presented to the jury as a factual question. Petitioner advanced the defense that his apparently increased net worth was attributable to a $300,000 cash hoard that he had received from his father prior to the prosecution years. Petitioner's sister (A. 1258-1275) and son (A. 1303-1344) testified to this effect. However, the government introduced evidence that petitioner's father experienced financial difficulties (A. 977-978, 1450-1451) and testimony that the alleged hiding place of petitioner's cash hoard did not exist at the time claimed (A. 1427-1434). The government also introduced into evidence petitioner's Michigan Intangibles Tax Returns for the years in question, showing no cash on hand (A. 623-625), and used a detailed cash analysis for the 16 years prior to the prosecution period to show that petitioner could not have accumulated any significant amount of cash during those

Johnson, 319 U.S. 503, 519. However, even if the expert's testimony is conclusory or expresses an opinion, it is admissible as long as it is based on evidence of record. *United States* v. *Callanan*, 450 F. 2d 145, 149 (C.A. 4). Here, the summary witness' testimony merely explained his analysis of evidence that was in the record. See *Friedberg* v. *United States*, 348 U.S. 142, 144-145.

years (A. 2080).[5] Thus, the jury had to determine whether, on the proof submitted, petitioner had any cash on hand, over and above the unknown but constant amount credited to him in the government's net worth computations, that could have been the source of his expenditures and increased net worth during the period in question. *Holland* v. *United States*, *supra*, 348 U.S. at 134; *Friedberg* v. *United States*, 348 U.S. 142, 143-145; *United States* v. *Carter*, 462 F. 2d 1252, 1254 (C.A. 6), certiorari denied, 409 U.S. 984.[6] Here, by its verdict, the jury rejected petitioner's claim of a cash hoard.[7]

[5]Petitioner argues (Pet. 12 n. 4) that the trial court erred in admitting evidence of an agent's computation that petitioner understated his income during years not covered in the indictment. But it is well established that the government may reconstruct a taxpayer's income for prior years in net worth cases in order to negate a claim of cash hoard. *Holland* v. *United States*, *supra*, 348 U.S. at 133-134; *Vloutis* v. *United States*, 219 F. 2d 782, 789 (C.A. 5).

This same evidence also refutes petitioner's further contention (Pet. 14) that the defense expert witness was asked to assume a fact not in evidence when he was asked to compute petitioner's net worth using zero for cash on hand. There was ample evidence to indicate petitioner's lack of substantial cash on hand.

[6]Indeed, even in cases in which the government contends that there was a zero balance for opening cash on hand, and the evidence shows some cash on hand, it is for the jury to decide whether there was enough cash to account for the increases in the taxpayer's net worth. *Vloutis* v. *United States*, *supra*, 219 F. 2d at 793; *United States* v. *Goichman*, 407 F. Supp. 980 (E.D. Pa.), affirmed, 547 F. 2d 778 (C.A. 3).

[7]*Taglianetti* v. *United States*, 398 F. 2d 558 (C.A. 1), affirmed, 394 U.S. 316, and *Phillips' Estate* v. *Commissioner*, 246 F. 2d 209 (C.A. 5), upon which petitioner relies (Pet. 7-10, 15), are not to the contrary. In *Taglianetti*, the court required "precise figures" for opening and closing net worth. But it went on to explain that this does not mean that an exact dollar value must be determined for each of the several assets comprising the taxpayer's opening net worth. At all events, the question is whether the proof is "sufficient to allow the

2. Petitioner further contends (Pet. 15-16) that the government's use of a joint net worth statement for him and his wife was error. But petitioner filed his returns for the years in question jointly with his wife. Thus, he and his wife became a single entity for purposes of federal income taxation (*Coerver* v. *Commissioner*, 36 T.C. 252, 254, affirmed, 297 F. 2d 837 (C.A. 3)), with joint tax liability. Section 6013(d)(3), Internal Revenue Code of 1954. Petitioner was convicted of willfully attempting to evade the federal income tax imposed on this entity. Thus, it was the net worth of the entity that was relevant to determine whether there was any unreported income during the years in question. Moreover, as the court of appeals noted (Pet. App. 27), the evidence showed that petitioner personally controlled and handled all finances for the couple during the prosecution years, and the wife's "financial transactions were intertwined with those of her husband" (see, *e.g.*, A. 505-509, 538, 647-656, 662-689, 1025-1027, 1032). Under these circumstances, the court of appeals correctly concluded (Pet. App. 27) that, "[a]s in *United States* v. *Costello*, 221 F. 2d 668, 674 (2d Cir. 1955), *aff'd*, 350 U.S. 359 (1956), the evidence was

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jury an intelligent determination of the single relevant issue: whether any expenditures found to be in excess of reported income can be accounted for by assets available at the outset of the prosecution period" (398 F. 2d at 565-566). Here, there was sufficient proof of opening net worth to satisfy the *Taglianetti* standards.

In *Phillips' Estate*, the court stated that the government could not satisfy its burden as to any item in the net worth statement simply by pronouncing that it did not change during the years in question. But there the court noted that the "record contains not a syllable" of evidence from which a finding of constant cash could be derived (246 F. 2d at 212) and that the Tax Court's finding could not pass even the clearly erroneous test (*id.* at 214). Here, on the other hand, the cash on hand question was the subject of much evidence from which the jury could make a finding whether there was sufficient cash to account for the change in petitioner's net worth.

sufficient to permit the government to treat expenditures by Mrs. Giacalone as having been made with her husband's money."*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1978.

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*It is not uncommon to use a joint net worth analysis in the prosecution of a husband alone where the evidence shows, as here, that the wife does not have an independent source of funds for her expenditures. See, *e.g.*, *United States* v. *Balistrieri*, 403 F. 2d 472, 474 (C.A. 7), certiorari denied, 394 U.S. 985, vacated on other grounds, 395 U.S. 710; *Ford* v. *United States*, 210 F. 2d 313, 314 (C.A. 5), certiorari denied, 352 U.S. 833; *United States* v. *Goichman*, *supra*, 407 F. Supp. at 995-996; *United States* v. *Shy*, 383 F. Supp. 673, 676 (D. Del.).

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